In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:

JOHN LEON HUNTER, JR.

Debtor

JOHN LEON HUNTER, JR.

Movant

v.

DEAN WITTER FINANCIAL SERVICES, INC.

Respondent

Chapter 7 Case

Number 92-41510

FILED
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Date 10-31-94
MARY C. BENTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

MEMORANDUM AND ORDER ON MOTION TO AVOID LIEN

This matter comes before the Court on Debtor's Motion to reopen his Chapter 7 Case and avoid the lien of Dean Witter Financial Services, Inc. ("Dean Witter"). On June 23, 1994, this court entered an order reopening the case and

directing the Clerk to schedule a hearing on the question of whether Dean Witter's lien should be avoided under section 522(f)(1) of the Bankruptcy Code. That hearing was held on August 16, 1994, after which the court took the matter under advisement. Based upon the evidence adduced at the hearing, the record in the file and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on July 28, 1992. Dean Witter filed a proof of claim in the case indicating that it held a secured claim against Debtor in the amount of $16,506.72, by virtue of a judgment obtained in the Superior Court of Chatham County, Georgia on May 14, 1992. Debtor did not object to Dean Witter's claim.

Debtor owns a one-half undivided interest in a parcel of real estate, and improvements thereon, located at 1701 Butler Avenue, Tybee Island, Chatham County, Georgia. Debtor and one or more business partners operate a "bed and breakfast" on the property known as the "Hunter House." At the time of Debtor's bankruptcy, the property was encumbered by two security deeds securing a total debt of $180,000.00. Debtor valued the property in his bankruptcy schedules at $190,000.00 and claimed a $5,400.00 personal exemption in the property pursuant to O.C.G.A. §44-

13-100(6).[1]

In light of the two security deeds securing a total debt of $180,000.00, Dean Witter's $16,506.72 judgment lien, and Debtor's claimed exemption, the Chapter 7 trustee determined that the property was of inconsequential value to the estate, and abandoned it. Debtor thereafter reaffirmed his debt with the creditors holding the security deeds, but did not move at that time to have Dean Witter's lien avoided as impairing his exemption under section 522(f)(1) of the Bankruptcy Code. Debtor received his discharge, and the case was closed on November 19, 1992.

At some point after Debtor's case was closed, he attempted to refinance the debt on the property and discovered that Dean Witter's lien still encumbered the property. As a result, on May 19, 1994, Debtor filed a motion seeking to reopen his case and avoid the lien. Dean Witter filed a brief in opposition to

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[1] O.C.G.A. § 44-13-100(a)(6) provides:

> (a)In lieu of the exemption provided in Code Section 44-13-1, any debtor who is a natural person may exempt, pursuant to this article, for purposes of bankruptcy, the following property:
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> > (6) The debtor's aggregate interest not to exceed $400 in value plus any unused amount of the exemption provided under paragraph (1) of this subsection, in any property.

Paragraph (1) of subsection (a) provides an exemption of up to $5,000.00 of real or personal property that a debtor or dependent uses as a residence or in a burial plot of a debtor or dependent. *See* O.C.G.A. § 44-13-100(a)(1). Thus, the total "wild card" exemption under section 44-13-100(a)(6) is $5,400.00.

Debtor's motion indicating that it opposed both the reopening of Debtor's case and the avoidance of its lien. At a June 8, 1994 hearing to consider that part of Debtor's motion seeking to reopen his case, Dean Witter argued that Debtor was prevented from reopening his case by a one-year statute of limitation within the Bankruptcy Code. Dean Witter subsequently withdrew that contention on brief, and offered no other basis for denying the portion of Debtor's motion seeking to reopen his case. Accordingly, this court entered an Order on June 24, 1994, reopening the case and directing the Clerk to set a hearing on the issue of lien avoidance.[2] Therefore, the only matter presently before the court is that part of Debtor's motion seeking to avoid Dean Witter's lien.

The parties stipulated to the following facts at the August 16, 1994 hearing on this issue. In 1991, the Chatham County Board of Tax Assessors appraised the Hunter House property at $190,000.00 for the purpose of assessing property taxes. In December of 1992, the Board initially raised its valuation of the property to $240,000.00, but, after Debtor appealed, reduced it back to the 1991 level of

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[2] The court notes that there could have been other grounds for denying the motion to reopen based upon passage of time (between closing date and date of motion) and significant expense to Dean Witter in pursuing and enforcing its judgment. *See e.g.*, Matter of Bianucci, 4 F.3d 526, 528 (7th Cir. 1993) (passage of time alone does not create sufficient prejudice to deny a motion to reopen to avoid a lien, but delay, when combined with other factors, such as significant expenditures by the lien creditor, may be prejudicial and warrant denial of the motion). Dean Witter did not, however, make this argument or present sufficient evidence to support such an argument, perhaps because it could not show prejudicial delay.

$190,000.00. In January of 1994, a real estate appraiser determined the property's fair market value to be $300,000.00.

The one fact that was not stipulated to is what the fair market value of the property was on July 28, 1992, the date Debtor filed his Chapter 7 petition. Debtor bears the burden of proof on this issue.[3] Beyond the fact that Debtor valued the property at $190,000.00 in his schedules, neither party presented any direct evidence as to the property's value on July 28, 1992. The only independent evidence of the property's value at any point during 1992 is the tax valuation of $190,000.00. While testimony at the hearing indicated that this figure is not always a reliable indicator of fair market value, it nevertheless stands uncontradicted by Dean Witter and minimally satisfies Debtor's burden of proving value by a preponderance of the evidence. Accordingly, I find the value of the property to have been $190,000.00 on July 28, 1992, the date Debtor filed his Chapter 7 petition. I also find that the value of the property as of May 19, 1994, the date Debtor filed the instant motion, to be at least $300,000.00, based upon the appraisal introduced by Dean Witter.

Thus, the value of the Hunter House property has grown substantially since Debtor filed his Chapter 7 petition, a fact not lost upon Dean Witter. It

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[3] *See* In re Sherwood, 79 B.R. 399, 400 (Bankr. W.D.Wis. 1986).

contends that, in light of the Supreme Court's decision in Dewsnup v. Timm, -- U.S. --, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992), the appropriate point in time for fixing the value of the property is May 19, 1994, the date Debtor filed the instant motion, rather than the date Debtor filed his Chapter 7 petition. If this contention is correct, then there is, based upon my finding that the property had a value of at least $300,000.00, sufficient equity to cover both Debtor's $5,400.00 exemption and Dean Witter's $16,506.72 judgment lien.

CONCLUSIONS OF LAW

"Prior to the Supreme Court's ruling in Dewsnup . . . , it was well settled that, for the purpose of determining a debtor's entitlement to exemptions, the value of property sought to be exempted was to be determined as of the [petition] filing date."[4] The question, then, is whether Dewsnup alters this rule.

In Dewsnup, a Chapter 7 debtor wanted to use the valuation provisions of sections 506(a) and (d) of the Bankruptcy Code to "strip down" an undersecured creditor's consensual lien on the debtor's real property. That is, the debtor sought to

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[4] In re Finn, 151 B.R. 25, 27 (Bankr. N.D.N.Y 1992). *See also* White v. Stump, 266 U.S. 310, 45 S.Ct. 103, 69 L.Ed. 301 (1924); In re Hrncirik, 138 B.R. 835, 839 (Bankr. N.D. Tex. 1992); In re Sanglier, 124 B.R. 511, 513 (Bankr. E.D.Mich. 1991).

"freeze" the creditor's secured interest in the property at the judicially determined value (which was substantially less than the balance of the debt that the lien secured), thereby preventing the creditor from benefitting from any possible post-petition appreciation in the property.

The Supreme Court concluded, however, that the Debtor could not use section 506 to strip away the unsecured portion of an undersecured creditor's consensual lien:

> § 506(d) does not allow [the debtor] to "strip down" [the creditor's] lien, because [the creditor's] claim is secured by a lien and has been fully allowed pursuant to § 502.[5]

In reaching this conclusion, the court made the following observations about the effect of a bankruptcy proceeding upon a consensual lien:

> We think . . . that the creditor's lien stays with the real property until the foreclosure. That is what was bargained for by the mortgagor and the mortgagee . . . . Any increase over the judicially determined valuation during bankruptcy rightly accrues to the

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[5] Dewsnup v. Timm, 112 S.Ct. at 778.

benefit of the creditor, not to the benefit of the debtor . . .[6]

Thus, the rule in Dewsnup is clear: A Chapter 7 debtor is not entitled to use sections 506(a) and (d) to "freeze" a consensual lienholder's lien at the value of the property on the petition date, and thereby prevent that portion of the lien that is unsecured from reattaching to any appreciation that might occur during the bankruptcy. Whether a more expansive legal principle should be drawn from the case, however, is not as clear. Dean Witter argues that the following principle is to be taken from Dewsnup: As between a debtor in bankruptcy and an undersecured creditor holding a lien against the debtor's property, the creditor is entitled to enjoy the post-petition appreciation in the property. Dean Witter argues that this principle requires Debtor's property to be valued as of the date the instant motion was filed, so that it, like the creditor in Dewsnup, can enjoy the post-petition appreciation that the Hunter House property has experienced.

This court is not, however, convinced that the principle urged by Dean Witter is properly taken from Dewsnup. The Supreme Court explicitly limited its

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[6] Id.

holding in Dewsnup to the specific issue before it,[7] which issue plainly did not include the appropriate point in time for valuing property for the purpose of determining a debtor's entitlement to exemptions. Hence, there is no basis for concluding that Dewsnup changes the well-settled rule that the petition date is the relevant date for determining a debtor's entitlement to claim an exemption. As the District Court for Southern District of Georgia has recently noted:

> The date on which the bankruptcy petition is filed and the order for relief is entered is the watershed date of a bankruptcy proceeding. As of this date, creditors' rights are fixed (as much as possible), the bankruptcy estate is created, and *the value of the debtor's exemptions is determined.*[8]

Thus, the rule that a debtor's property is to be valued as of the bankruptcy petition filing date for the purpose of determining entitlement to exemptions remains intact after Dewsnup.[9]

Accordingly, the relevant figure for determining Debtor's entitlement

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[7] Id. at 778.

[8] In re Johnson, 165 B.R. 524, 528 (S.D. Ga. 1994) (emphasis added).

[9] *Accord* In re Finn, 151 B.R. at 27 (concluding that Dewsnup does not change the well-settled rule that property is valued as of bankruptcy petition date, even when a debtor's motion to avoid a lien is filed after bankruptcy case has been closed).

to claim an exemption in the Hunter House property is $190,000.00, which was the property's value on the petition-filing date. Therefore, Debtor had, by virtue of his one-half undivided ownership interest in the property, a $5,000.00 equity interest in the property, exclusive of Dean Witter's lien. (($190,000.00 - $180,000.00) / 2).

Turning, then, to the question of avoidance, section 522(f)(1) empowers a debtor to "avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is . . . a judicial lien."[10] According to the Supreme Court, the first question to ask in applying this provision is "whether avoiding the lien would entitle the debtor to an exemption, and if it would, then avoid and recover the lien . . ."[11] In other words, if the presence of a judicial lien prevents a debtor from being able to take an exemption that he would otherwise be able to claim in its absence, then the lien impairs the debtor's exemption and is subject to avoidance under section 522(f).

It is apparent that the nature and extent of a debtor's exemption must

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[10] 11 U.S.C. §522(f)(1). There is no dispute that Dean Witter's lien is a "judicial lien," as that term is used in section 522(f).

[11] Owen v. Owen, 500 U.S. 305, 312-13, 111 S.Ct. 1833, 1837-38, 114 L.Ed.2d 350 (1991)

be defined before a court can reach the question of impairment. Because Georgia has opted out of the federal scheme of exemptions and substituted its own scheme in the form of O.C.G.A. § 44-13-100(a), the nature and extent of Debtor's entitlement to an exemption in the Hunter House property is purely a question of Georgia law.[12] Once Debtor's exemption is established, the issue of impairment and avoidance becomes a question of federal law.[13]

As to the question of Debtor's exemption, the Georgia Court of Appeals has made clear that a debtor's exemptible interest under O.C.G.A. § 44-13-100(a) is limited to his unencumbered interest in the property:

> A bankrupt is entitled to claim a homestead exemption only from his "aggregate interest" in real property. O.C.G.A. § 44-13-100(a). This means that "only the unencumbered portion of the property is to be counted in computing the 'value' of the property for the purposes of determining the exemption.[14]

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[12] *See e.g.*, In re Herman, 120 B.R. 127, 129 (9th Cir. BAP 1990).

[13] *See e.g.*, Matter of Henderson, 18 F.3d 1305, 1309 (5th Cir. 1994); In re Chabot, 992 F.2d 891, 894 (9th Cir. 1993); In re Herman, 120 B.R. 127, 129 (9th Cir. BAP 1990);

[14] Wallis v. Clerk, Superior Court of Dekalb County, 166 Ga.App. 775, 776, 305 S.E.2d 639, 640-41 (1983) (*quoting in part* 9 Am.Jur.2d 526, Bankruptcy § 315).

Thus, economic equity is a pre-requisite to a claim of exemption under Georgia law.[15]

As applied to the facts in this case, on the date Debtor filed his petition, Dean Witter's $16,506.72 lien exceeded any equity, and therefore exhausted any exemptible interest, that Debtor would have otherwise had in the Hunter House property. Absent Dean Witter's lien, however, there was $5,000.00 equity from which Debtor could claim his exemption under O.C.G.A. §44-13-100(6). Because avoidance of Dean Witter's lien would create $5,000.00 equity from which Debtor could take his

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[15] This conclusion is consistent with the Eleventh Circuit's holding in In re Bland, 793 F.2d 1172 (11th Cir. 1986). In that case, the debtors claimed an exemption under O.C.G.A. § 13-44-100(4) in household goods and furnishings and sought, under section 522(f)(2) of the Bankruptcy Code, to avoid a nonpossessory nonpurchase-money security interest that a creditor held in those items. Relying upon Wallis, *supra*, the creditor argued that the debtors did not possess an exemptible interest in the property because the value of the household goods was less than the amount of the its lien. Thus, according to the creditor, the debtors had no equity interest in the property and therefore no exemption to protect.

> The Eleventh Circuit, however, rejected this argument, reasoning as follows:
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> > Wallis is irrelevant to the issue before us because it involved a purchase money security interest. Section 522(f) allows the debtor to avoid "a nonpossessory, nonpurchase-money security interest"; it is thus unavailable to a debtor such as Wallis, whose exempt property was encumbered by purchase money liens. Because Wallis could not have avoided the liens on his house, he indeed had no "interest" to exempt. By contrast, in the Blands' case, appellant's security interest is not a purchase money interest and the Blands therefore had an "interest" in the property. *Accordingly, section 522(f) was available to set aside the lien, and once the lien has been set aside the property is no longer encumbered; hence the exemption, as set forth in Georgia law, is available.*
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> Bland, 793 F.2d at 1175 (emphasis added).

Thus, the Court recognized what was subsequently made clear by the Supreme Court in Owen: The relevant question under section 522(f) is whether a debtor would be able to take an exemption, as defined under the relevant federal or state exemption statute, in the absence of the lien in question. That is, in the absence of the lien that is subject to avoidance, does a debtor have an exemptible interest (which in Georgia is equity) in the subject property.

exemption, it is clear that Dean Witter's lien impaired an exemption that Debtor would have otherwise been entitled to under Georgia law. "Indeed, the exemption would be impaired by any lien where the debtor's equity [in the absence of the judicial lien] is greater than zero but less than the exemption amount of [$5,400.00]."[16] Dean Witter's lien is, therefore, subject to avoidance under section 522(f)(1).

This conclusion does not end the inquiry, however. As noted above, only $5,000.00 of Dean Witter's lien must be avoided to permit Debtor's exemptible interest in the property to be fully realized, thus raising the question of what becomes of the remainder of its lien. Does section 522(f) entitle the Debtor to avoid all of Dean Witter's lien, or only that portion that actually interferes with (i.e., is equal to) his $5,000.00 exemption? Stated another way: Does section 522(f) contemplate a "carve out" of that portion of a lien necessary to accommodate a debtor's exemption and subordination of the remainder of the lien, or does it contemplate complete avoidance of the lien? The significance of this question is clearly illustrated by the facts of this case because the value of the property has appreciated since the closing of Debtor's case.

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[16] In re Prestegaard, 139 B.R. 117, 119 (Bankr. S.D.N.Y. 1992) (*quoting* Bowmar, Avoidance of Judicial Liens in Bankruptcy: The Workings of 11 U.S.C. § 522(f)(1), 63 Am.Bankr.L.J. 375, 387 (1989)).

While Section 522(f) is beguiling in its apparent clarity, it defies simple application. The phrase "avoid the fixing" suggests total avoidance, while the phrase "to the extent [it] impairs" suggests a *pro tanto* reduction in an amount equal to the exemption. Not surprisingly, the courts that have considered this vexing question have not agreed on the correct answer.[17] A number of courts, focusing upon the debtor's need for a "fresh start," have concluded that any amount of a lien, which exceeds the equity remaining after first applying the debtor's exemption, must be avoided.[18] These courts construe the concept of impairment expansively:

> [I]mpairment should be construed in a manner consistent with the fresh start purposes served by the applicable Code provisions. In this regard, in determining whether a lien impairs an exemption under section 522(f) we apply a practical approach to determining the impact that a judicial lien may have on the debtor's ability to use a given piece of exempt property to achieve his or her fresh start. Where the creditor's lien has no present economic value, i.e., the exemption plus the encumbrances with priority ahead of the judicial lien at issue equal or exceed the value of the property, the lien essentially is just a cloud upon the debtor's title and right to future enjoyment of the

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[17] Neither the Supreme Court nor the Eleventh Circuit has considered this question.

[18] *See e.g.*, Matter of Henderson, 18 F.3d 1305, 1310-11 (5th Cir. 1994); Matter of Lapointe, 150 B.R. 92, 93-94 (Bankr. D.Conn. 1993); In re Cross, 164 B.R. 496, 500-01 (Bankr. E.D.Penn. 1994); In re Patterson, 139 B.R. 229, 231-32 (9th Cir. BAP 1992); In re Herman, 120 B.R. 127 (9th Cir. BAP 1990); In re Kopstein, 163 B.R. 573 (Bankr. N.D.Cal. 1994); In re Cravey, 100 B.R. 119, 121-22 (Bankr. S.D.Ga. 1989) (Dalis, B.J.) In re Magosin, 75 B.R. 545 (Bankr. E.D.Pa. 1987); In re Princiotta, 49 B.R. 447 (Bankr. D.Mass. 1985); In re Blevins, 53 B.R. 74, 75 (Bankr. W.D.Va. 1985).

property and the lien impairs the exemption.[19]

This approach clearly enhances a debtor' fresh start because it ensures the debtor, rather than the lien creditor, will enjoy the future equity that will be created as the property appreciates and the debtor pays down the consensual liens encumbering it. Application of this approach to the instant case would subject all of Dean Witter's lien to avoidance because there is no equity, after Debtor's $5,000.00 exemption, to which its lien can attach.

Other courts, clearly the majority, have concluded that a debtor is entitled to avoid only that portion of a judicial lien that actually interferes with the debtor's exemption.[20] These courts, focusing upon the language of section 522(f) that

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[19] In re Herman, 120 B.R. at 131. *See also* Matter of Henderson, 18 F.3d at 1310; Matter of Lapointe, 150 B.R. at 95.

[20] *See e.g.*, In re Chabot, 992 F.2d 891, 895 (9th Cir. 1993); In re Opperman, 943 F.2d 441, 443-44 (4th Cir. 1991) (dicta); Fitzgerald v. Davis, 729 F.2d 306, 308 (4th Cir. 1984) (suggesting that impairment is function of debtor's equity); Dominion Bank, N.A. v. Osborne, 165 B.R. 183, 185 (W.D.Va. 1994); Matter of Howard, 169 B.R. 71, 72 (D.Colo. 1994); In re Alu, 41 B.R. 955, 957-58 (E.D.N.Y. 1984); In re Abrahimzadeh, 162 B.R. 676, 679-80 (Bankr. D.N.J. 1994); In re Jones, 166 B.R. 567, 661-62 (Bankr. N.D.Ill. 1994); In re Harrison, 164 B.R. 611, 612-14 (Bankr. N.D.Ill. 1994); In re Garro, 161 B.R. 869, 870 (Bankr. D.Mass. 1993); In re Mersham; 158 B.R. 698, 701-03 (Bankr. N.D.Ohio 1993); In re Menell, 160 B.R. 524, 526-27 (Bankr. D.N.J. 1993); In re Gonzalez, 159 B.R. 9, 10-11 (Bankr. D.Mass. 1993) In re Cerniglia, 137 B.R. 722, 726 (Bankr. S.D.Ill. 1992); In re Bellenoit, 157 B.R. 185, 187 (Bankr. D.Mass. 1992) (advocating subordination to extent of actual impairment); In re D'Amelio, 142 B.R. 8, 10 (Bankr. D.Mass. 1992); In re Prestegaard, 139 B.R. 117, 119-20 (Bankr. S.D.N.Y. 1992); In re Sanglier, 124 B.R. 511 (Bankr. E.D.Mich. 1991); In re Hermansen, 84 B.R. 729, 732 (Bankr. D.Colo. 1988).

provides that a debtor may avoid a judicial lien "*to the extent that*"[21] the lien impairs a debtor's exemption, conclude that section 522(f) plainly limits a debtor's right of avoidance to an amount which is necessary to carve out his or exemption, and no more. The Fourth Circuit's recent observation in this area is illustrative:

> A lien larger in amount than the exemption available to the debtor does not impair that exemption. Thus, only that part of a lien which actually interferes with the debtor's homestead exemption may be avoided.[22]

Under this approach, Debtor would only be entitled to avoid Dean Witter's lien in an amount that is equal to his exemption. Thus, only $5,000.00 of the lien would be subject to avoidance, leaving the remaining $11,506.72 of the lien as an unsecured or inchoate encumbrance against the property on the date of bankruptcy, reattaching as the equity in the property has grown.

Both approaches yield anomalous results when applied to the full range of possible fact patterns that arise under Section 522(f). The infirmity in the carve-out approach is revealed when there are multiple judgment liens encumbering property in

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[21] 11 U.S.C. § 522(f) (emphasis added).

[22] Opperman, 943 F.2d at 444.

which a debtor claims an exemption. Suppose, for example, that, instead of a single $16,000.00 judgment lien, there were sixteen different liens of $1,000.00 each encumbering Debtor's property. It is difficult to imagine that Congress intended Section 522(f) to be used to avoid the five liens filed first in time, and leave the remaining 11 junior liens in place, but that is the apparent result under the partial avoidance approach.

The weakness of the full avoidance analysis is best illustrated when there is equity in property over and above the non-avoidable liens and the debtor's exemption. The question in such a case is whether a court applying the full-avoidance approach would allow a judgment lien to attach to the extent of the equity available after the debtor's exemption. If so, the avoidance is not "full" but extends only to that part of the lien that does not have present equity to which can attach. And the portion of the lien which is avoided, therefore is lost not because it is an encumbrance which "impairs" debtor's exemption, but because it is unsecured. This is true because that portion of a judgment lien that attaches to equity (i.e., that is secured) is just as much, if not more, of an "impairment" of debtor's future enjoyment of the exemption as is the portion of lien that is unsecured. Both are equally cumbersome upon a debtor emerging from bankruptcy. The key difference is that one portion is secured and the other is not. Thus, the "full" avoidance rule which, in reality still preserves the

secured portion of the judgment lien, must originate from an application of other provisions of the Code.

I conclude that the "carve-out" approach, which limits avoidance to the actual amount of a debtor's exemption, is more faithful to the plain language of section 522(f). It is the only way to give meaning to both the phrase "avoid the fixing of," and the phrase "to the extent that." However, as noted above, this result does not yield consistent results when applied to varied fact patterns, especially in the frequently occurring case where there are multiple judgment liens which exceed the debtor's exemptible interest. Then, inexplicably, it requires that the liens which are first in time be fully avoided to allow the debtor to enjoy the $5000.00 exemption, while the liens of junior lien creditors remain unsecured but unavoided encumbrances upon the property. This result is completely at odds with the "first-in-time, first-in-right" lien priority system under state law.

The obvious solution to this conundrum is to apply section 522(f) in conjunction with sections 506(a) and (d). Such an approach is far more consistent with the statutory scheme of the Code than judicial attempts, under the full-avoidance approach, to give definition to the concept of impairment. Yet it avoids the pitfalls that arise in application of the carve-out approach. In the instant case, the only part

of Dean Witter's lien that must be avoided to preserve the exemption is that portion which consumes the $5,000.00 of equity that would otherwise be available. Once this part of its lien is avoided, the Debtor is able to exempt the full amount available under state law and the inquiry under Section 522(f) should cease. The remainder of Dean Witter's lien, however, is unsecured, and under the plain language of sections 506(a) and (d), the lien is void.

This approach yields equitable and consistent results over the entire range of possible fact patterns. In the instant case, where there is no equity available after Debtor's exemption, $5,0000.00 of the lien would be avoided under section 522(f) and the remainder under sections 506(a) and (d). In the case where there is equity available after a debtor's exemption, none of the lien would be subject to avoidance under section 522(f), the lien would remain attached to the extent of available equity, and the excess lien would be void pursuant to section 506(a) and (d). In the case where there are multiple liens and no equity available after a debtor's exemption, the lien or liens that actually interfere with a debtor's exemption would be avoided under section 522(f) and the remaining liens under sections 506(a) and (d). And finally, in the case where there are multiple liens and equity after a debtor's exemption, none of the liens would be avoided under section 522(f), the liens would be allowed in order of priority to the extent of the available equity, and any remaining liens would be

avoided under sections 506(a) and (d).

However, the question of whether Section 506 can be applied in this manner in light of Dewsnup, looms.[23] As set forth above, the Supreme Court held in Dewsnup that a debtor could not use sections 506(a) and (d) to value a consensual lienholder's lien and then strip down the unsecured portion of its lien.[24] It bears repeating, however, that the Court expressly limited its holding to the specific facts before it:

> Hypothetical applications that come to mind and those advanced at oral argument illustrate the difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations. We therefore focus upon the case before us and allow other facts to await their legal resolution another day.[25]

The Court's construction of sections 506(a) and (d) in Dewsnup was expressly limited to cases where a debtor attempts to strip down a consensual lienholder's lien and prevent the lienholder from benefitting from any possible increase

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[23] Although Section 506 avoidance questions must, under Bankruptcy Rule 7001, be brought as adversary proceedings, I construe the positions of the parties here to have submitted all avoidance questions for resolution in this order despite any procedural objections which might otherwise have been made.

[24] Dewsnup v. Timm, 112 S.Ct. at 778.

[25] Id.

in the value of the property during bankruptcy. The present case, on the other hand, involves a nonconsensual judgment lien that is partially subject to avoidance under section 522(f), and in which the appreciation in value came after the case was fully administered.

This being the case, is it clear that the Supreme Court would extend Dewsnup to these facts? I think not. While the facts were not exhaustively set forth in Dewsnup, the majority opinion seems hinged to the concept of "the real deficiency" and states that any increase in value which occurs "during bankruptcy,"[26] rightly accrues to the creditor.[27]

If hard cases make bad law, Dewsnup was certainly a hard case. The creditor's bargained-for lien was to be stripped despite the possibility of an

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[26] Id.

[27] Specifically, the Court stated:

> We think, however, that the creditor's lien stays with the real property until the foreclosure. This is what was bargained for by the mortgagor and the mortgagee. The voidness language sensibly applies only to the security aspect of the lien and then only to the real deficiency in the security. Any increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the creditor, not to the benefit of the debtor and not to the benefit of other unsecured creditors whose claims have been allowed and who had nothing to do with the mortgagor-mortgagee bargain.

Dewsnup v. Timm, 112 S.Ct. at 778 (emphasis added).

appreciation in value as of the date of distribution which would result in the debtor, of all people, recovering money that otherwise would be paid to the lienholder. It is easy to see why the court found such a result distasteful, even if textual.

In the case before me, no foreclosure has taken place, but Debtor has been granted a discharge. There is no evidence of any post-petition, pre-foreclosure or "during bankruptcy" appreciation in value. The appreciation in value, while substantial, all occurred after the case was fully administered, only to be reopened for the sole purpose of considering the lingering efficacy, if any, of the judgment lien. I conclude that Dewsnup does not control on its facts or by necessary implication. Because it does not, and because the interplay of Section 522(f) and Section 506 achieves the most consistent result on all conceivable fact patterns, I hold that Debtor is entitled to avoid $5,000.00 of Dean Witter's judgment lien under Section 522(f)(1). I further hold that the remaining $11,506.72 of Dean Witter's lien was unsecured at the time this estate was administered and is therefore void under Sections 506(a) and (d).

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT

IS THE ORDER OF THIS COURT that judgment lien of Dean Witter Financial Services, Inc. is hereby declared null and void pursuant to the provisions of 11 U.S.C. Section 522(f)(1) and 11 U.S.C. Sections 506(a) and (d).

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 28th day of October, 1994.